IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 24, 2008

STATE OF TENNESSEE v. MONICA BUTLER, JESSICA PICKETT, AND SHERYL ANN MARSHALL

Appeal from the Criminal Court for Sumner County
Nos. 1049-2006, 1053-2006 & 29-2007 Dee David Gay, Judge

No. M2007-02718-CCA-R3-CO - Filed September 10, 2008

The Defendants, Monica Butler, Jessica Pickett, and Sheryl Ann Marshall, were each charged with one count of theft of services from Gallatin Housing Authority valued between $1,000.00 and $10,000.00. The Defendants underreported their income to obtain public housing at a lower rate. The Defendants moved to dismiss the indictments, arguing that these circumstances were not within the purview of the theft of services statute. See Tenn. Code Ann. § 39-14-104. The trial court granted the motion, concluding that occupancy of a residence pursuant to a lease term was not a service under the plain meaning of the statute. The State appeals. Following our review of the record, the order of the Sumner County Criminal Court dismissing the indictments is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Robert Depew and Jon Tucci, Assistant District Public Defenders, Gallatin, Tennessee, for the appellees, Monica Butler, Jessica Pickett and Sheryl Ann Marshall.

Robert E. Cooper, Jr., Attorney General; Preston Shipp, Assistant Attorney General; Lawrence R. Whitley, District Attorney General; and Thomas Dean, Assistant District Attorney General, for the appellant, State of Tennessee.

OPINION

Factual Background

The Defendants leased public housing from Gallatin Housing Authority (GHA). Rent was computed on an income-based formula, and the Defendants were to report any change in income. The allegations against the Defendants were that, during their respective tenancies, they failed to report income to GHA in order to receive lower rental rates. A Sumner County grand jury charged

each Defendant with theft of services valued between $1,000.00 and $10,000.00, a Class D felony. See Tenn. Code Ann. §§ 39-14-104, -105.

The Defendants filed identical motions to dismiss the indictments against them, contending that the definition of "services" for the theft of services statute did not include a leasehold interest. See Tenn. Code Ann. § 39-11-106(a)(35). A hearing was held, at which the State argued that GHA provided a service to the Defendants in the form of income-based public housing. A service which, according to the State, the Defendants obtained by deception and fraud.

The trial court read the affidavit of complaint regarding Defendant Butler into the record:

> The affidavit of complaint on Monica Butler states that on October 3rd, 2005, Monica Butler signed a lease agreement with the Gallatin Housing Authority, and her rent was based on her income. Based on the income that she reported, she was to pay $50 a month. The lease agreement stated that because her rent was income-based, Butler was to report any changes in her income to GHA, and her rent would be adjusted accordingly.
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> Butler also signed forms stating that she was reporting her income accurate [sic]; in another form that she knew it was a violation to willfully make false statements for the purpose of obtaining rental assistance.
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> On 9/7/06, Butler renewed her lease with Gallatin Housing Authority, and she again signed all forms acknowledging that she was aware of the requirements for proper reporting of income and for the penalties for failing to do so. GHA verified Butler's income with her employers . . . . Other income was verified through Louisiana Child Support and Tennessee Department of Human Services. Butler failed to report this income to GHA during the period when she renewed her lease. Based on this income, Butler owes GHA $2,483 in retroactive rent.

The same type of lease agreement applied to Defendants Pickett and Marshall; the only difference being that Defendant Butler was provided electricity in addition to gas and water. According to the State, Defendants Pickett and Marshall also made false statements to GHA regarding their incomes, leading to lower rental rates.

The trial court granted the Defendants' motion to dismiss the indictments, explaining that "retroactive rents" were not "within the services definition." The State appeals from the order of dismissal.

ANALYSIS

The Defendants were charged with "unlawfully or intentionally obtain[ing] services of the value or $1,000.00 or more from Gallatin Housing Authority by deception, fraud, false pretense or

other means . . . ." The issue on appeal is whether the Defendants, by leasing public housing, received a "service" under Tennessee Code Annotated section 39-14-104. Section 39-14-104 provides that a person commits the offense of theft of services who:

> (1) Intentionally obtains services by deception, fraud, coercion, false pretense or any other means to avoid payment for the services;
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> (2) Having control over the disposition of services to others, knowingly diverts those services to the person's own benefit or to the benefit of another not entitled thereto; or
>
> (3) Knowingly absconds from establishments where compensation for services is ordinarily paid immediately upon the rendering of them, including, but not limited to, hotels, motels and restaurants, without payment or a bona fide offer to pay.

The sentencing commission comments to this section state that "[t]his section punishes theft of services, as defined in § 39-11-106." Section 39-11-106(a)(35) defines "services" to include "labor, skill, professional service, transportation, telephone, mail, gas, electricity, steam, water, cable television or other public services, accommodations in hotels, restaurants or elsewhere, admissions to exhibitions, use of vehicles or other movable property . . . ."

The State argues on appeal that receipt of public housing is both a "public service" and "an accommodation" within the "services" definition provided in section 39-11-106(a)(35). First, the State contends that public housing is a "public service," citing to Tennessee Code Annotated section 13-20-413[1]: "[T]he overriding statutory policy of housing authorities in Tennessee, the very

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[1] Tennessee Code Annotated section 13-20-413 provides as follows:

> It is declared to be the policy of this state that each housing authority shall manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with its providing decent, safe and sanitary dwelling accommodations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city. To this end, an authority shall fix the rentals for dwellings in its projects at no higher rates than it shall find to be necessary in order to produce revenues which (together with all other available moneys, revenues, income and receipts of the authority from whatever sources derived) will be sufficient to:
>
> (1) Pay, as the same become due, the principal of and interest on the bonds of the authority;
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> (2) Meet the cost of, and to provide for, maintaining and operating the projects (including the cost of any insurance on its property or bonds) and the administrative expenses of the authority; and
>
> (3) Create (during not less than the six (6) years immediately succeeding its issuance of any bonds) a reserve sufficient to meet the largest principal and interest payments which will be due on

(continued...)

motivation for the existence of public housing . . . is to provide a public service—'dwelling accommodations at the lower possible rates consistent with its providing decent, safe and sanitary dwelling accommodations.'" Second, the State, again citing to the language of section 13-20-413, submits that public housing is an accommodation "elsewhere" within the purview of the definition of "services."

The Defendants counter that

> [t]he enumerated public services in the statute include telephone, gas, electricity, steam, water and cable television. The general class of services enumerated are forms of utilities. Public housing as referred to by the [State] would not be of the same kind or class even if it could be considered a 'public service.'

As to whether public housing is an accommodation "elsewhere," the Defendants reply that "it is improper to classify a leasehold interest at a housing authority as the same kind or class as accommodations at hotels or restaurants" which are transitory or temporary in nature. The Defendants also note that the legislature did not include public housing within the definition of "services" and has not chosen to specifically criminalize such conduct elsewhere in the code.

The trial court agreed with the Defendants and dismissed the indictments. The trial court reasoned that the Defendants did not receive a "public service" but rather if they paid their rent, "these services [would] be provided." Regarding whether this was an accommodation, the trial court concluded as follows:

> Let's compare accommodations with rent, retroactive rent, and see how that comes under—applies in the plain language. Rent is a payment for the use of the land and the house at fixed intervals, and I have a hard time finding that retroactive rent under these circumstances are services with the meaning of the statute.
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> So let's look at the lease itself. It's entitled Public Housing Lease, and the lease goes on to say, these premises leased are for the exclusive use and occupancy of the resident or the resident's household. Is that a service? It doesn't appear to be a service within the plain meaning of that statute.
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> Lease term. This lease shall begin on October 3rd, 2005. The term shall be for one year and shall renew automatically for another year. Now, is that an accommodation? It doesn't appear to be.
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> Rental payment. Resident shall pay monthly rent of $50, and the rent is based on the income and other information reported by the resident, and each year the

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[1](...continued)
such bonds in any one (1) year thereafter and to maintain such reserve.

> information is updated or recertified. Is that an accommodation? It doesn't appear to be within the plain meaning of the service definition.
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> . . . .
>
> I mean, is this an accommodation? Is this lodging? Is this room and board? Yes, but it's a dwelling, and it's not an accommodation under the terms, the plain terms of the statute . . . .
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> Also, I've noticed in the code, and maybe the legislature will do this some day, but there are specific statutes that have been addressed to deal with various criminal issues, communication theft; destruction or connection to public water pipes, public utility fraud; theft or destruction of property; and theft of cable television services. There have been four separate statues that have been passed and possibly others dealing with issues similar to this.
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> . . . I don't find that the retroactive rents are within the services definition.

It appears that this is a matter of first impression in Tennessee. We begin by noting that when examining a purely legal issue, such as statutory construction, Tennessee appellate courts adhere to a de novo standard with no presumption of correctness as to the lower court's conclusions of law. State v. Collins, 166 S.W.3d 721, 725 (Tenn. 2005) (citing State v. Wilson, 132 S.W.3d 340, 341 (Tenn. 2004)).

The Tennessee Supreme Court has ruled that "[t]he most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995). With this in mind, the first step in determining legislative intent is to determine whether the statutory language itself is ambiguous. If it is not, we are limited to the plain meaning of the statutory language.

We are instructed by our highest court to "initially look to the language of the statute itself in determining the intent of the legislature. Courts are restricted to the natural and ordinary meaning of the language used by the legislature in the statute, unless an ambiguity requires resort elsewhere to ascertain legislative intent." Browder v. Morrs, 975 S.W.2d 308, 311 (Tenn. 1998) (citing Austin v. Memphis Pub. Co., 655 S.W.2d 146, 148 (Tenn. 1983)). Appellate courts must "assume that the legislature used each word in the statute purposely, and that the use of these words conveys some intent and has a meaning and purpose." Id. (citing Locust v. State, 912 S.W.2d 716, 718 (Tenn. Ct. App. 1995)). Thus, "[w]here the words of the statute are clear and plain and fully express the legislature's intent, there is no room to resort to auxiliary rules of construction, and we need only enforce that statute as written." Id. (citing In re Conservatorship of Clayton, 914 S.W.2d 84, 90 (Tenn. Ct. App. 1995) and Roberson v. Univ. of Tennessee, 912 S.W.2d 746, 747 (Tenn. Ct. App. 1995)).

We conclude that the issue presented requires a finding of "legislative intent" that cannot fairly and accurately be construed solely from the language of the "services" statute. Here, the trial court applied the rules of statutory construction and considered the plain language of the statute in reaching its decision. We agree with the trial court that the Defendants did not receive a "service" within the purview of the theft of services statute.

First, the public housing provided by GHA does not constitute a "public service" under the "services" definition. The Defendants correctly point to the statutory rule of construction "*ejusdem generis*." *Ejusdem generis* means that "where general words follow special words which limit the scope of the statute, general words will be construed as applying to things of the same kind or class as those indicated by the preceding special words." State v. Young, 196 S.W.3d 85, 104 (Tenn. 2006) (quoting Lyons v. Rasar, 872 S.W.2d 895, 897 (Tenn. 1994)). In section 39-11-106, the phrase "other public service" is preceded by an enumerated list of services, mostly utilities. As noted by the trial court, the Defendants did not receive a "public service" but rather if they paid their rent, "these services [would] be provided."

Second, public housing is not equivalent to "accommodations in hotels, restaurants or elsewhere" as these accommodations are transitory and temporary in nature. The trial court thoroughly analyzed the provisions of the lease and determined that the housing received by the Defendants was not an accommodation within the plain meaning of the statute. We agree that occupancy of a dwelling pursuant to a lease term is not an accommodation within the scope of the theft of services statute. Moreover, a service or accommodation was not provided when the Defendants renewed their respective leases and recertified to GHA that their income was accurate. To conclude that the present circumstances fall under the meaning of the "services" definition would impermissibly extend the coverage of the statute.

Finally, as noted by the trial court, our legislature has criminalized certain actions in similar situations; for example, TennCare fraud codified at Tennessee Code Annotated section 71-5-2601; communications theft codified at Tennessee Code Annotated section 39-14-149; destruction or interference with utility lines, fixtures, or appliances codified at Tennessee Code Annotated section 39-14-411; and unauthorized water connections codified at Tennessee Code Annotated section 65-27-107. Under the present statute, "public service" does not include developments by a public housing authority. Our legislature has not yet seen fit to criminalize the behavior at issue.

CONCLUSION

Based upon the foregoing reasoning, we conclude that the public housing received by the Defendants does not fall within the "services"definition for purposes of the theft of services statute. The order of the trial court dismissing the indictments against the Defendants is affirmed.

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DAVID H. WELLES, JUDGE